Supreme Court, U.S.
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No. 06-751 NOV 27 2006

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IN THE
Supreme Court of the United States

* * * * *

DONALD ROBERTS,
Petitioner,

vs.

MIKE KEMNA and JEREMIAH NIXON, ATTORNEY GENERAL OF THE STATE OF MISSOURI,
Respondents.

* * * * *

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS EIGHTH CIRCUIT

* * * * *

PETITION FOR WRIT OF CERTIORARI

* * * * *

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QUESTIONS PRESENTED

Whether a certificate of appealability should be issued to allow the Court of Appeals to determine whether Mr. Roberts's constitutional right to be free from adverse comment on his failure to testify was violated when defense witnesses were presented and the prosecutor said, in final argument, "You haven't heard any testimony about what [the defendant] said, about his theory of the case."?

Whether a certificate of appealability should be issued to allow the Court of Appeals to determine whether Mr. Roberts showed "cause and prejudice" sufficient to excuse post-conviction counsel's failure to present a claim which Mr. Roberts made known to post-conviction counsel but which post-conviction counsel inadvertently omitted from state pleadings in violation of state rules?

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I

PETITION FOR WRIT OF CERTIORARI

The Petitioner, Donald Roberts, respectfully prays that a Writ of Certiorari issue to review the judgment and order of the United States Court of Appeals, Eighth Circuit rendered in these proceedings on July 18, 2006.

OPINION BELOW

The unpublished order of the United States Court of Appeals denying a certificate of appealability is reprinted in the Appendix at page 1a, *infra*. The unpublished order of the United States Court of Appeals, Eighth Circuit, denying rehearing is reprinted in the Appendix at App. p. 40a, *infra*. The unpublished order of the United States District Court, and the report and recommendation of the United States Magistrate Judge, Eastern District of Missouri, are reprinted in the Appendix beginning at pages 2a and 6a, *infra*.

JURISDICTION

The judgment of the United States Court of Appeals, Eighth Circuit, was entered July 18, 2006. A timely petition to that court for rehearing or, in the alternative, for rehearing *en banc*, was denied August 29, 2006.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

U.S. CONST. Art. I, §9, cl. 2

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

U.S. CONST. Amend. V

No person shall be held to answer for a capital or other infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time or war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

U.S. CONST. Amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

U.S. CONST. Amend. XIV, Due Process Clause

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

18 U.S.C. §2253

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal for a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the appellant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicated which specific issue or issues satisfy the showing required by paragraph (2).

Mo. Sup. Ct. R. 29.15. Conviction After Trial--Correction

(a) **Nature of Remedy--Rules of Civil Procedure Apply.** A person convicted of a felony after trial claiming that the conviction or sentence imposed violates the constitution and laws of this state or the constitution of the United States, including claims of ineffective assistance of trial and appellate counsel, that the court imposing the sentence was without jurisdiction to do so, or that the sentence imposed was in excess of the maximum sentence authorized by law may seek relief in the sentencing court pursuant to the provisions of this Rule 29.15. This Rule 29.15 provides the exclusive procedure by which such person may seek relief in the sentencing court for the claims enumerated. The procedure to be followed for motions filed pursuant to this Rule 29.15 is governed by the rules of civil procedure insofar as applicable.

(b) **Form of Motion--Cost Deposit Not Required--Time to File--Failure to File, Effect of.** A person seeking relief pursuant to this Rule 29.15 shall file a motion to vacate, set aside or correct the judgment or sentence substantially in the form of Criminal Procedure Form No. 40.

No cost deposit shall be required.

If an appeal of the judgment or sentence sought to be vacated, set aside or corrected was taken, the motion shall be

filed within 90 days after the date the mandate of the appellate court is issued affirming such judgment or sentence.

If no appeal of such judgment or sentence was taken, the motion shall be filed within 180 days of the date the person is delivered to the custody of the department of corrections.

If:

(1) An appeal of such judgment or sentence is taken;

(2) The appellate court remands the case resulting in entry of a new judgment or sentence; and

(3) An appeal of the new judgment or sentence is taken, the motion shall be filed within 90 days after the date the mandate of the appellate court is issued affirming the new judgment or sentence.

If no appeal of such new judgment or sentence is taken, the motion shall be filed within 180 days of the later of:

(1) The date the person is delivered to the custody of the department of corrections; or

(2) The date the new judgment or sentence was final for purposes of appeal.

Failure to file a motion within the time provided by this Rule 29.15 shall constitute a complete waiver of any right to proceed under this Rule 29.15 and a complete waiver of any claim that could be raised in a motion filed pursuant to this Rule 29.15.

(c) **Clerk's Duties.** Movant shall file the motion and two copies thereof with the clerk of the trial court. The clerk shall immediately deliver a copy of the motion to the prosecutor. Upon receipt of the motion, the clerk shall notify the sentencing judge and shall notify the court reporter to prepare and file the complete transcript of the trial if the transcript has not yet been prepared or filed. If the motion is filed by an indigent pro se movant, the clerk shall forthwith send a copy of the motion to the counsel who is appointed to represent the movant.

(d) **Contents of Motion.** The motion to vacate shall include every claim known to the movant for vacating, setting aside, or correcting the judgment or sentence. The movant shall declare in the motion that the movant has listed all claims for relief known to the movant and acknowledging the movant's understanding that the movant waives any claim for relief known to the movant that is not listed in the motion.

(e) **Pro Se Motion--Appointment of Counsel--Amended Motion, Required When.** When an indigent movant files a pro se motion, the court shall cause counsel to be appointed for the movant. Counsel shall ascertain whether sufficient facts supporting the claims are asserted in the motion and whether the movant has included all claims known to the movant as a basis for attacking the judgment and sentence. If the motion does not assert sufficient facts or include all claims known to the movant, counsel shall file an amended motion that sufficiently alleges the additional facts and claims. If counsel determines that no amended motion shall be filed, counsel shall file a statement setting out facts demonstrating what actions were taken to ensure that (1) all facts supporting the claims are asserted in the pro se motion and (2) all claims known to the movant are alleged in the pro se motion. The statement shall be presented to the movant

prior to filing. The movant may file a reply to the statement not later than ten days after the statement is filed.

(f) **Withdrawal of Counsel.** For good cause shown, counsel may be permitted to withdraw upon the filing of an entry of appearance by successor counsel. If appointed counsel is permitted to withdraw, the court shall cause new counsel to be appointed. If an indigent movant is seeking to set aside a death sentence, successor counsel shall have at least the same qualifications as required by Rule 29.16 as the withdrawing counsel.

(g) **Amended Motion--Form, Time for Filing--Response by Prosecutor.** Any amended motion shall be signed by movant or counsel. The amended motion shall not incorporate by reference material contained in any previously filed motion. If no appeal of the judgment sought to be vacated, set aside, or corrected is taken, the amended motion shall be filed within sixty days of the earlier of: (1) the date both a complete transcript has been filed in the trial court and counsel is appointed or (2) the date both a complete transcript has been filed in the trial court and an entry of appearance is filed by any counsel that is not appointed but enters an appearance on behalf of movant. If an appeal of the judgment sought to be vacated, set aside, or corrected is taken, the amended motion shall be filed within sixty days of the earlier of: (1) the date both the mandate of the appellate court is issued and counsel is appointed or (2) the date both the mandate of the appellate court is issued and an entry of appearance is filed by any counsel that is not appointed but enters an appearance on behalf of movant. The court may extend the time for filing the amended motion for one additional period not to exceed thirty days. Any response to the motion by the prosecutor shall be filed within thirty days after the date an amended motion is required to be filed.

(h) **Hearing Not Required, When.** If the court shall determine the motion and the files and records of the case conclusively show that the movant is entitled to no relief, a hearing shall not be held. In such case, the court shall issue findings of fact and conclusions of law as provided in Rule 29.15(j).

(i) **Presence of Movant--Record of Hearing--Continuance of Hearing--Burden of Proof.** At any hearing ordered by the court the movant need not be present. The court may order that testimony of the movant shall be received by deposition. The hearing shall be on the record and shall be confined to the claims contained in the last timely filed motion. The court may continue the hearing upon a showing of good cause. The movant has the burden of proving the movant's claims for relief by a preponderance of the evidence.

(j) **Findings and Conclusions--Judgment.** The court shall issue findings of fact and conclusions of law on all issues presented, whether or not a hearing is held. If the court finds that the judgment was rendered without jurisdiction, that the sentence imposed was illegal, or that there was a denial or infringement of the rights given movant by the constitution of Missouri or the constitution of the United States as to render the judgment subject to collateral attack, the court shall vacate and set aside the judgment and shall discharge the movant or resentence the movant or order a new trial or correct the judgment and sentence as appropriate.

(k) **Appeal--Standard of Appellate Review.** An order sustaining or overruling a motion filed under the provisions of this Rule 29.15 shall be deemed a final judgment for purposes of appeal by the movant or the state. If the court finds that a movant allowed an appeal is an

indigent person, it shall authorize an appeal in forma pauperis and furnish without cost a record of all proceedings for appellate review. When the appeal is taken, the circuit court shall order the official court reporter to promptly prepare the transcript necessary for appellate review without requiring a letter from the movant's counsel ordering the same. If the sentencing court finds against the movant on the issue of indigence and the movant so requests, the court shall certify and transmit to the appellate court a transcript and legal file of the evidence solely on the issue of indigence so as to permit review of that issue by the appellate court. Appellate review of the trial court's action on the motion filed under this Rule 29.15 shall be limited to a determination of whether the findings and conclusions of the trial court are clearly erroneous.

(l) **Successive Motions.** The circuit court shall not entertain successive motions.

(m) **Schedule.** This Rule 29.15 shall apply to all proceedings wherein sentence is pronounced on or after January 1, 1996. If sentence is pronounced prior to January 1, 1996, postconviction relief shall continue to be governed by the provisions of Rule 29.15 in effect on the date the motion was filed or December 31, 1995, whichever is earlier.

STATEMENT OF THE CASE

Summary. This petition concerns the failure of the district court and court of appeals to issue a certificate of appealability in Mr. Roberts's federal habeas corpus proceeding under 28 U.S.C. §2254.

Facts and procedural history. Mr. Roberts was convicted of second degree murder, first degree assault, and

two counts of armed criminal action. He was sentenced to four consecutive life terms. He presented a defense of self-defense.

Mr. Roberts was a passenger in a car driven by Thomas Gould. Christopher McLafferty (the decedent) and Louis Viviano were in another car. Both cars stopped on the highway. Mr. Viviano and Mr. McLafferty got out of their car and walked toward Mr. Gould's car. Mr. Gould testified that he was scared for his life because Mr. McLafferty was crouching down, moving towards him while Mr. Gould was still in the car.

Mr. Roberts got out of the car and walked toward Mr. McLafferty. Mr. McLafferty left the driver's side of Mr. Gould's car, went to the car's passenger side where Mr. Roberts was standing, and punched Mr. Roberts so hard that Mr. Roberts fell to the ground, stunned.

After Mr. McLafferty walked toward Mr. Roberts, Mr. Viviano came up to Mr. Gould. When Mr. Roberts regained some consciousness, he saw Mr. Viviano holding Mr. Gould's head and punching him. When Mr. Roberts swung to his left to get back in the car, Mr. Viviano tried to grab him.

Mr. Viviano testified that he saw Mr. Roberts get out of the car and run behind Mr. McLafferty. Mr. Viviano told Mr. McLafferty, "Come on, let's go," then Mr. McLafferty said he had been stabbed. He saw Mr. McLafferty standing dazed and drenched in blood. He carried Mr. McLafferty towards the car and then noticed that he had also been cut. He never saw Mr. Roberts actually come at him and never saw a knife in Mr. Roberts' hand. Mr. Viviano had stab wounds to his arm, hand, the left side of his chest, and abdomen, requiring surgery. Mr. McLafferty died of multiple stab wounds.

Mr. Roberts presented testimony from the driver of his car, Thomas Gould, and two other witnesses who saw part of the altercation but were not involved. Mr. Gould testified concerning the attack on him by Mr. Viviano and Mr. McLafferty's attack on Mr. Roberts.

In final argument, after stating that the prosecution witnesses gave consistent testimony, the prosecutor stated, "You haven't heard any testimony about what [the defendant] said, about his theory of the case." A defense objection was sustained, and an instruction was given the jury to disregard the comment. r. Roberts's motion for mistrial was denied.

Appeal. On direct appeal, the Missouri Court of Appeals found that Mr. Roberts's right against self-incrimination was not violated because the prosecutor's challenged comment was not an improper comment on failure to testify.

Post-conviction proceedings. Mr. Roberts filed a *pro se* motion for post-conviction relief under Missouri Supreme Court Rule 29.15. Under that rule, when a *pro se* motion for post-conviction relief is filed, counsel is appointed. Counsel is commanded to "ascertain. . . whether the movant has included all claims known to the movant as a basis for attacking the judgment and sentence. If the motion does not. . . include all claims known to the movant, counsel shall file an amended motion that sufficiently alleges the additional claims." Mo. Sup. Ct. R. 29.15(e). There is no requirement that the movant review or sign the amended motion before filing. Rule 29.15 provides that it is "the exclusive procedure by which such person may seek relief in the sentencing court for the claims enumerated," which include claims of ineffective assistance of counsel.

Mr. Roberts's appointed post-conviction lawyer sent him a questionnaire to determine whether he had additional claims not listed in the original motion. In his response, Mr. Roberts indicated that Dr. Richard Payne should have been called as a witness to testify that the wounds received by the victim had probably occurred in the way Mr. Roberts's witnesses described, rather than as the state's witnesses said.

When preparing the amended motion, post-conviction counsel overlooked this point. She did not provide Mr. Roberts with a draft of the amended motion before it was filed, and filed it near the date it was due. Mr. Roberts contacted counsel as soon as he noticed that the amended motion did not contain this claim, but by then the deadline for filing an amended motion had passed. Post-conviction counsel obtained a report from Dr. Payne, App. p. A-38[1], but made no attempt to present Dr. Payne's evidence in court. After evidentiary hearing, the motion court denied relief, and the Missouri Court of Appeals affirmed.

Mr. Roberts then filed a timely proceeding under 28 U.S.C. §2254. After receiving a report and recommendations from a United States Magistrate Judge, App. p. A-7, the district court denied relief, and also denied a certificate of appealability. App., p. A-2. The court of appeals likewise denied certificate of appealability and dismissed the appeal. App. p. A-1.

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[1] Dr. Payne's report was presented to the district court as Traverse Exhibit 4.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT CERTIORARI TO REQUIRE THE COURT OF APPEALS TO CLARIFY THE LAW CONCERNING ADVERSE COMMENT ON FAILURE TO TESTIFY.

Since *Griffin v. California*, 380 U.S. 609 (1965), this Court has consistently held that it is a violation of the Fifth Amendment for the prosecutor to comment on the defendant's failure to testify at trial. Here, by misconstruing the prosecutor's words, the courts of Missouri and the Eighth Circuit Court of Appeals have eviscerated this right.

In final argument, the prosecutor was discussing defense counsel's theory of the case. He said, "You haven't heard any testimony about what he said, about his theory of the case." Defense counsel objected and received an instruction to disregard, but the court denied his motion for mistrial.

Rejecting Mr. Roberts's contention that the prosecutor's statement constituted an impermissible comment on his failure to testify at trial, the courts below have focused exclusively on the antecedent of the pronouns "he" and "his" in the above statement. They have held that it is clear that these pronouns refer to defense counsel, rather than the defendant. That may be true. But what is significant here is the prosecutor's use of the word "testimony" in connection with the defense theory, not the antecedents of "he" and "his."

The defense argued that Mr. Roberts feared for his life when he struck out at Mr. McLafferty. Mr. Roberts offered testimony on behalf of the defense. But he did not testify. There was only one person who could have offered

"testimony" about defense counsel's theory of the case which was not presented. That person was Mr. Roberts.

In *Griffin v. California*, 380 U.S. 609, 611 (1965), this Court held,

> It is said. . . that the inference of guilt for failure to testify as to facts peculiarly within the accused's knowledge is in any event natural and irresistible, and that comment on the failure does not magnify that inference into a penalty for asserting a constitutional privilege. [citation omitted.] What the jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another.

For that reason, the Court condemned the California court's holding that a prosecutor could properly comment on the failure of the defendant to testify as to "any evidence or facts against him which the defendant can reasonably be expected to deny or explain because of facts within his knowledge. . ." *Id.* at 610.

When, as in this case, the prosecutor does not specifically refer to the defendant's failure to testify, the comments are nevertheless improper if "the language used was manifestly intended to be or was of such a character that the jury would naturally and necessarily take it to be comment on the defendant's failure to testify." *United States v. Lyon*, 397 F.2d 505, 509 (7th Cir.), cert. denied sub nom., *Lysczyk v. United States*, 393 U.S. 846, 89 S.Ct. 131, 21 L.Ed.2d 117 (1968).

In *Harkness v. State*, 107 Nev. 800, 803, 820 P.2d 759 (Nev. 1991), the Nevada Supreme Court applied this test

to the prosecutor's statement, "If we have to speculate and guess about what really happened in this case, whose fault is it if we don't know the facts in this case? . . . Again, we know so little about the case really in terms of what the defendant told us, which naturally raises the logical question, what is he hiding?" The Court found that the statement was a violation of the Fifth Amendment despite holding that the prosecutor did not necessarily *intend* to comment on the defendant's failure to testify. Instead, the Court focused on the fact that the jury would necessarily assume that their attention was being directed to the failure to testify.

Unlike the exclusionary rule against evidence of illegal searches, which is enforced by this Court because of its prophylactic effect on law enforcement, the rule against comment on failure to testify simply enforces the Fifth Amendment. It is not intended to punish the state for the prosecutor's improper conduct. Therefore, the prosecutor's intent, while not irrelevant, should not be the primary focus of the analysis. Rather, the focus should be on the jury's probable understanding of what the prosecutor said. See *State v. Miller*, 76 N.M. 62, 70, 412 P.2d 240, 246 (N.M. 1966) (Any comment on failure to testify violates the Fifth Amendment); *State v. McMurry*, 143 Idaho 312, 143 P.2d 400, 403-404 (Id. App. 2006) (Prosecutor's comment "reinforced the suggestion that McMurry's silence at trial was evidence of guilt."

Illustrative of the lengths to which state and federal courts go to avoid reversal on this issue is the Missouri case of *State v. Dees*, 916 S.W.2d 287, 295 (Mo. App. 1995), *cert. denied* 519 U.S. 857 (1996). There, the court declined to grant plain error relief when the prosecutor said, in final argument, that Ms. Dees "hasn't come forward and given truthful testimony." And the Ninth Circuit Court of Appeals ratified the California courts' determination that the

prosecutor's comment in *Hovey v. Ayers*, 458 F.3d 892, 911-912 (9th Cir. 2006), "Well, [Hovey] has admitted in effect the kidnapping and he has admitted in effect the killing, but he's never said anything to you about why, why he did these things," was harmless error. Finally, the Fourth Circuit recently held that the prosecutor's statement, "Is silence what an innocent man does? Does an innocent man not protest when somebody asks?" did not constitute an impermissible comment on failure to testify. *United States v. Williams*, 445 F.3d 724, 737 (4th Cir.), *cert. denied,* 127 S.Ct. 314 (2006). Clearly, this issue deserves further attention from this Court.

Moreover, the denial of certificate of appealability in this case was a clear violation of *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003). Given the decisions in *Griffin*, *Harkness*, *Miller*, and *McMurry*, supra, the decision of the district court in this case is at least "debatable among jurists of reason." As this Court noted in *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003):

> We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail.

Neither the district court nor the court of appeals explained why they concluded that Mr. Roberts was not entitled to a certificate of appealability on this issue. It can only be concluded that, like the Court of Appeals in *Miller-El v. Cockrell*, supra, the courts here impermissibly focused on the merits of the issue rather than the fact that a significant issue of constitutional law was presented. In light of this continuing confusion about the standard for a

certificate of appealability, review by this Court is appropriate.

II. THIS COURT SHOULD GRANT CERTIORARI AND REQUIRE THE COURT OF APPEALS TO DEVELOP THE ISSUE OF ABANDONMENT BY STATE POST-CONVICTION COUNSEL.

This Court has been understandably reluctant to intrude when state courts provide post-conviction procedures. But when such procedures curtail the criminal defendant's attempts to present claims of ineffective assistance of counsel rather than providing an avenue for the defendant to litigate such claims in state court, the intervention of the federal courts is warranted and necessary. Mr. Roberts's situation presents such a case.

Mr. Roberts, as required by Mo. Sup. Ct. R. 29.07(b)(4), was advised of his right to proceed under Mo. Sup. Ct. R. 29.15. Despite the fact that he is of low intelligence and low educational level, he complied with the requirements of Rule 29.15 and timely filed a motion for post-conviction relief and an affidavit of indigence. The court then properly appointed a Missouri public defender to represent him.

Under Missouri law, the duties required of a public defender are minimal:

> Counsel shall ascertain whether sufficient facts supporting the claims are asserted in the motion and whether the movant has included all claims known to the movant as a basis for attacking the judgment and sentence. If the motion does not assert sufficient facts or include all claims known to the movant,

> counsel **shall** file an amended motion that sufficiently alleges the additional facts and claims.

Mo. Sup. Ct. R. 29.15(e), emphasis added. Mr. Roberts's appointed counsel made a minimal attempt to comply with this provision. She never met with Mr. Roberts, but she did send him a written questionnaire which asked him various questions about possible issues in his case. Mr. Roberts did his part. He completed the questionnaire as best he could, and mentioned that he had an expert witness, Dr. Richard Payne, who had not been presented at trial. This claim was not included in Mr. Roberts's pro se post-conviction motion.

Dr. Payne would have testified about a highly disputed issue at trial: Whether Mr. Roberts stabbed Mr. McLafferty when the latter was attacking him, as Mr. Roberts's witnesses testified, or whether Mr. Roberts ran after Mr. McLafferty and stabbed him from behind as he was retreating, as the state's witnesses testified. Dr. Payne would have stated that Mr. McLafferty's wounds were more consistent with being stabbed from the front. This unbiased evidence would have greatly strengthened Mr. Roberts's claim of self-defense. Dr. Payne's report, App. p. A-38, establishes that he was available at the time of Mr. Roberts's trial and would have presented testimony had he been retained to do so. Since trial counsel argued (without much support in the record) that Mr. Roberts had stabbed Mr. McLafferty from the front, there is no strategic reason why trial counsel should not have presented Dr. Payne's expert testimony. Thus, this post-conviction claim includes all the elements of a meritorious claim of ineffective assistance of counsel.

Once post-conviction counsel had received Mr. Roberts's questionnaire identifying his claim that Dr. Payne

should have been presented at trial, her responsibility under Missouri law was to "file an amended motion that sufficiently alleges the additional facts and claims." But she omitted this claim which Mr. Roberts had identified. And she did not give him an opportunity to remind her of this omission before the due date of the amended motion. Missouri provides no procedure for correcting this error, and therefore post-conviction counsel was unable to present evidence to support Mr. Roberts's claim. No court has yet heard such evidence.

> [I]t is entirely sensible that a state post-conviction remedy that is no more than a delusive hope, for example one that cannot be effectually employed without the assistance of a competent attorney, should not generate a procedural default that the federal courts are bound to respect. . .

Eric M. Freedman, *Fewer Risks, More Benefits: What Governments Gain by Acknowledging the Right to Competent Counsel on State Post-Conviction Review in Capital Cases,* 4 OHIO STATE JOURNAL OF CRIMINAL LAW 183, 189 (2006). Mr. Roberts is in exactly the circumstance contemplated by Mr. Freedman. He did what he was supposed to do under Missouri law. He filed a *pro se* motion and gave his appointed post-conviction counsel the information she requested. As in *Mapes v. Coyle*, 171 F.3d 408, 429 (6th Cir. 1999), Mr. Roberts did what he was required to do under Missouri law, and should not be responsible for the Missouri courts' failure to consider his claim. The federal court's reliance on post-conviction counsel's failure to do what Missouri law required her to do to bar review of Mr. Roberts's claim of ineffective assistance of counsel is "debatable among jurists of reason." Mr.

Roberts is entitled to a certificate of appealability as to this issue, and this Court should grant certiorari and so hold.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

DONALD ROBERTS Appellant,	§ § §	
v.	§	No. 06-1899
MIKE KEMNA and, JEREMIAH NIXON Appellees.	§ § §	

Before MURPHY, RILEY and COLLOTON, Circuit Judges

JUDGMENT

This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. The appeal is dismissed.

July 18, 2006

Order Entered at the Direction of the Court:

/s/

MICHAEL E. GANS

Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

DONALD ROBERTS,	)	
Petitioner	)	
	)	
v.	)	No. 4:02CV126 RWS
	)	
MIKE KEMNA and,	)	
JEREMIAH NIXON	)	
Respondents.	)	

MEMORANDUM OPINION

Petitioner Donald Roberts seeks a writ of habeas corpus. In his Petition he alleges six grounds for relief. I referred this matter to United States Magistrate Judge Thomas C. Mummert, III for a report and recommendation on all dispositive matters pursuant to 28 U.S.C. § 636(b). On December 15, 2005, Judge Mummert filed his recommendation that Roberts' habeas petition should be denied.

Roberts timely filed objections to the Report and Recommendation and objects to the recommendation that habeas relief be denied. I have conducted a de novo review of all matters relevant to the petition. I find that Judge Mummert correctly analyzed Roberts' grounds for relief and correctly applied the law in reaching his recommendation. After careful consideration, I will adopt and sustain the thorough reasoning of Judge Mummert in his Report and Recommendation and I will deny Roberts' habeas petition.

I only add that Roberts' contention in his sixth ground for relief that his post-conviction counsel effectively abandoned Roberts for failing to include one claim in his amended

motion for post-conviction relief is not a cognizable ground for relief in a habeas petition.[1]

The Supreme Court of Missouri has recognized a limited right to effective assistance of counsel in post-conviction hearings. *Luleff v. State*, 807 S.W.2d 495 (Mo. 1991). When post-conviction counsel totally defaults in carrying out the obligations imposed upon counsel by Missouri Supreme Court Rule 29.15(e), it constitutes abandonment. *State v. Bradley*, 811 S.W.2d 379, 384 (Mo. 1991). Under such circumstances, new counsel should be appointed. The filing of an amended petition out of time, for instance, can constitute abandonment. *Sanders v. State*, 807 S.W.2d 493, 494-95 (Mo. 1991). Roberts' claim that his post-conviction counsel left out one claim1 in the amended motion for post-conviction relief does not constitute abandonment because his counsel did not totally default in carrying out her obligations.

Even if it did constitute abandonment, abandonment by post-conviction counsel cannot be the basis for relief in a habeas proceeding. In *Mack v. Caspari*, 92 F.3d 637, 640 (8th Cir. 1996), the Eighth Circuit suggested the possibility

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[1] This claim concerned the potential evidence of a pathologist named Dr. Richard Payne. Roberts asserts that this claim was in a questionnaire that he filled out and gave to his appointed post-conviction counsel. Roberts alleges that his post-conviction counsel failed to include this claim in his amended motion for post-conviction relief. Because the record does not contain a copy this questionnaire there is no evidence in the record that supports Roberts' claim of abandonment or which allows me to evaluate it. An issue of how clearly this claim was made and identified in the questionnaire is raised in Roberts' own habeas petition which states that "Mr. Roberts's educational level and intelligence level are low, and his questionnaire was not very articulate, but it certainly included Dr. Payne's name." The fact that a copy of the questionnaire has not been filed in this case is a separate and independent ground upon which I rely in denying Roberts' sixth claim for habeas relief. proceeding does not test the legality of a prisoner's sentence.

of a constitutional due process violation if upon abandonment by post-conviction counsel, the Missouri trial court applied the procedural rule of appointing new counsel arbitrarily and prejudiced a petitioner. But, the Eight Circuit concluded in a later opinion that although a due process violation may exist in a state post-conviction proceeding, it is not cognizable in a habeas petition. *Kenley v. Bowersox*, 228 F.3d 934, 938 (8th Cir. 2000). The Court reasoned that habeas review under 28 U.S.C. §2254 was limited to the question of whether a petitioner was in custody in violation of the Constitution or laws or treaties of the United States. Id. An attack on the procedure employed in the state post-conviction does not test the legality of a prisoner's sentence. The Eighth Circuit based its conclusions on a litany of cases which held that a §2254 court is not the appropriate forum for a prisoner who wishes to challenge the process afforded to him in his post-conviction proceeding. Id., See *Williams v. State*, 640 F.2d 140, 143-44 (8th Cir. 1981) (procedural errors in post-conviction proceeding do not raise constitutional claims cognizable in habeas corpus proceedings); *Williams-Bey v. Trickey*, 894 F.2d 314, 317 (8th Cir. 1990)(post-conviction proceeding is collateral to petitioners' conviction and detention and is not a cognizable habeas claim); *Smith v. Lockhart*, 882 F.2d 331, 334 (8th Cir. 1989)(same). Although the Eighth Circuit's opinion in *Kenley* was later vacated, the case law upon which it relied is still the law in this Circuit.

As a result, even if Roberts had made a valid claim for abandonment by his post-conviction counsel, it is not a cognizable ground for habeas relief. Based on the conclusion that Roberts' post-conviction counsel's omission of a claim did not constitute abandonment and based on the reasons stated in Judge Mummert's Report and Recommendation I find Roberts' sixth claim for relief to be without merit.

I have also considered whether to issue a certificate of appealability. To grant a certificate of appealability, the Court must find a substantial showing of the denial of a federal constitutional right. See *Tiedeman v. Benson*, 122 F.3d 518, 522 (8th Cir. 1997). A substantial showing is a showing that issues are debatable among reasonable jurists, a court could resolve the issues differently, or the issues deserve further proceedings. *Cox v. Norris*, 133 F.3d 565, 569 (8th Cir. 1997) (citing *Flieger v. Delo*, 16 F.3d 878, 882-83 (8th Cir. 1994).

I believe that Roberts has not made such a showing on the grounds raised in his petition. Therefore, I will not issue a certificate of appealability.

Accordingly,

IT IS HEREBY ORDERED that Petitioner Donald Roberts' Petition for Writ of Habeas

Corpus is DENIED. IT IS FURTHER ORDERED that the Court will not issue a certificate of appealability. A separate judgment in accordance with this Memorandum and Order is entered this same date.

Dated this 16th day of March, 2006

/s/

RODNEY W. SIPPEL

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

DONALD ROBERTS,	)	
Petitioner	)	
	)	
v.	)	No. 4:02CV126 RWS
	)	
MIKE KEMNA and,	)	
JEREMIAH NIXON[1]	)	
Respondents.	)	

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

The 28 U.S.C. § 2254 petition of Donald Roberts ("Petitioner"), a Missouri prisoner serving four consecutive terms of life imprisonment with the possibility of parole, for federal habeas corpus relief is before the undersigned United States Magistrate Judge for a review and a recommended disposition. See 28 U.S.C. § 636(b).

Background

After the jury was seated, the prosecutor told them, in part, they would hear testimony about the stabbing by Petitioner of two men the night of January 26, 1996. (Resp. Ex. A-II at 201.) The two men and their girlfriends were in one car stopped by the side of the road; Petitioner and two other men were in Petitioner's car, also stopped. (Id. at 202, 203, 207.) One of the men, Chris McLafferty, punched Petitioner and knocked him to the ground. (Id. at 201.)

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[1] Because Petitioner is challenging a sentence to be served in the future, the Attorney General of Missouri, Jeremiah W. "Jay" Nixon, is hereby added as a proper party respondent. See Rule 2(b), Rules Governing Section 2254 in the United States District Courts.

McLafferty and Louis Viviano then helped Petitioner into Petitioner's car. (Id.) As they turned to walk back to their car, Petitioner stabbed them. (Id.) The prosecutor described it as "a case about two totally opposite worlds coming across just by chance in the middle of the night." (Id. at 202.)

One of Petitioner's trial counsel, Gregory Wittner, told the jury, in part, Petitioner was "viciously and violently sucker punched" in the face by McLafferty. (Id. at 216.) The punch caused him to fall backwards on the highway and become unconscious. (Id. at 217.) When he regained consciousness, he saw two large men, McLafferty and Viviano, standing over him. (Id.) The next thing he remembered was the feeling of being choked. (Id.) Fearing that he was going to die, Petitioner struck out with his knife at McLafferty until he was once again able to breathe. (Id. at 218.)

Viviano was the first witness to testify for the State.[2] (Id. at 222.) He testified that he; his fiancé, Rhonda McMasters; McLafferty; and McLafferty's fiancée, Emily Smith, were driving north on Highway 141 after spending the evening playing pool and drinking several, i.e., two to three, beers. (Id. at 225-28.) Viviano was driving his new Cobra Mustang; McMasters was in the front passenger seat; McLafferty and Smith were in the back. (Id. at 228.) When they stopped at a traffic light, the car next to them swerved into their lane. (Id. at 229.) Viviano swerved to avoid a collision, went onto the median, and then back on the road. (Id.) He drove off, so did the other car. (Id. at 230.) The other car sped up, so did he. (Id.) When Viviano saw someone in the back seat of the other car "flip[]" him off, he decided to turn around and head south on 141. (Id. at 232-33.) When he approached a red stop

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[2] The summary of the witnesses' testimony is not intended to be a complete recitation of the trial testimony. This summary is supplemented by the factual background set forth in the appellate court's decision affirming Petitioner's conviction and quoted, in relevant part, below.

light, the other car came up on the passenger side, swerved into his lane, ran him off the road, and then stopped in front of him. (Id.) McLafferty got out of the car, so did Viviano. (Id. at 236.) Viviano approached the driver's side, but McLafferty stayed at the back of the car. (Id. at 236-37.) Viviano asked the other driver what was going on. (Id. at 237.) Another man, identified as Petitioner, got out of the passenger's side of the car and walked at a fast pace toward McLafferty. (Id. at 237.) McLafferty hit him, knocking him down. (Id. at 238.) The driver of the other car then "floored" it. (Id.) That driver then did a U-turn and came back. (Id. at 238.) Viviano went over to where Petitioner was lying on the ground. (Id. at 241.) Viviano put his arms around Petitioner and lifted him up. (Id.) Petitioner was confused and kept asking questions about where he was and who Viviano was. (Id. at 241-42.) Viviano put Petitioner in the other car. (Id. at 242-43.) Viviano was looking at McLafferty when he saw Petitioner run up behind him. (Id. at 245, 306-07.) The returning car hit McLafferty, causing McLafferty to flip over the car. (Id. at 292.) The driver of the other car got out and punched Viviano in the face. (Id. at 245, 295.) The driver kept swinging at Viviano until Viviano got a hold of his arms. (Id. at 246.) Viviano told the other driver that he did not want to fight and let go of him. (Id. at 248.) The driver went back to the other car. (Id.) As Viviano and McLafferty walked back to their car, McLafferty told him that he had been stabbed. (Id. at 249.)

Viviano further testified that he did not know who had stabbed him. (Id. at 319.) He never saw a knife. (Id. at 250.) He also never saw McLafferty strangle, jump on, or stomp on Petitioner. (Id. at 240, 244.) He did not do so either. (Id. at 240, 244, 262-63.) McLafferty hit Petitioner only one time. (Id. at 239, 318.)

Viviano was stabbed six times, including once in his lung and once near his heart. (Id. at 255-56.)

Emily Smith testified that when both cars were stopped Viviano and McLafferty got out of the car. (Id. at 343.) A person in the front passenger side of the other car also got out as Viviano approached the driver's side. (Id. at 343-44, 348.) The person, identified as Petitioner, came up on McLafferty quickly. (Id. at 345.) McLafferty hit him in the face; Petitioner dropped to the ground. (Id.) McLafferty then walked away. (Id. at 346.) She did not see either McLafferty or Viviano strangle, kick, or wrestle Petitioner. (Id. at 346-47.) The other car took off when Petitioner was on the ground. (Id. at 348.) It circled the intersection and came back, "scoop[ing]" up McLafferty. (Id. at 348-49.) McLafferty rolled across the car's hood. (Id. at 349.) McLafferty and Viviano were walking back to their car when she saw Petitioner get out of the passenger side of the other car and run toward McLafferty. (Id. at 351-52.) McLafferty was bleeding when he came back to the car. (Id. at 353.) Smith never saw anyone with a knife, and never saw Viviano struggle with anyone. (Id. at 359.)

McMasters testified similarly to Viviano and Smith that, after both cars had stopped, Petitioner got out of the passenger side, quickly approached McLafferty, and fell after McLafferty punched him. (Id. at 391.) When Viviano and McLafferty were walking back to the car, both were bent over. (Id. at 394.) She never saw either man wrestle or strangle Petitioner. (Resp. Ex. A-III at 432.)

The medical examiner, Raj Nanduri, M.D., testified that McLafferty had six stab wounds in his back, all on the left side. (Id. at 454.) Although they varied in depth, most penetrated the muscle wall. (Id. at 452-53.) He died from the stab wounds in the back left side of his chest and abdomen. (Id. at 460.) Subra Vadlamani, M.D., and Robert Egan, M.D., also testified that McLafferty died from a stab wound to his heart. (Resp. Ex. A-IV at 624, 643.)

Charles Simshauser, a passenger in same car as Petitioner, was called as a witness for the State. He, Petitioner, and T.J. Gould, his then-girlfriend's son, were partying the night of January 26-27. (Resp. Ex. A-III at 518-19.) Gould was driving; Petitioner was riding in front; and he was in the back. (Id. at 527.) At one point, before they encountered the other car, Petitioner told him, "If anybody f**** with me I'll kill them." (Id. at 521.) Petitioner had a knife in his hand when he made this statement. (Id. at 523.) Simshauser had identified the knife in a deposition as being a double-bladed knife with a blade at least three inches long. (Id. at 522.) They drove from Illinois to Missouri and were on a highway when they noticed another car with two blonde girls. (Id. at 525.) They did not notice the two guys at first. (Id.) When the two cars later pulled over, Petitioner got out of his car and two guys got out of the Mustang. (Id. at 530.) T.J. drove off, doing "doughnuts." (Id. at 531.) Petitioner was laying on the ground. (Id.) When T.J. came back, he almost hit McLafferty. (Id.) McLafferty rolled over the car. (Id.) Simshauser never saw McLafferty attacking Petitioner when he was on the ground, nor did he see either McLafferty or Viviano do anything to Petitioner after McLafferty's first punch. (Id. at 534.) Viviano picked up Petitioner and tried to get him back into Petitioner's car. (Id.) McLafferty helped. (Id. at 535.) Petitioner resisted being placed in the car. (Id.) Eventually, the two men got Petitioner to sit down in the car. (Id. at 536.) Sitting in the back seat, Simshauser did not see either man choke, punch, or strangle Petitioner. (Id. at 536-37.) Petitioner started getting angry when he was being put back in the car. (Id. at 572.) Before the two men walked away, Petitioner took his knife out of his back pocket. (Id. at 538.) This was the knife Simshauser had seen earlier. (Id.) Petitioner headed toward the two men as they walked away; T.J. got out of the car. (Id. at 539.) Simshauser saw McLafferty fighting with T.J. and choking him. (Id. at 579.) He also saw Petitioner make a stabbing motion and then saw

the two men head back to their car. (Id. at 540-42.) He never saw anyone but Petitioner with a knife. (Id. at 543.) When everyone was back in their respective cars, the Mustang drove quickly off. (Id. at 545.) When Petitioner was back in the car, he did not recall being knocked out and he said he had stabbed someone. (Id. at 546-47.) T.J. told him he did not. (Id. at 547.) They drove by a nearby hospital and saw the Mustang, with blood all over it. (Id.) As they crossed the bridge back to Illinois, Petitioner said to pull over and threw a knife wrapped in a shirt out the window. (Id. at 548-50.) After they learned that someone had died, Petitioner called Simshauser and told him to be quiet. (Id. at 554.) Simshauser had been convicted of three felonies. (Id. at 554-55.)

Kevin Carle, a detective sergeant with the Jefferson County Sheriff's Department, interviewed Petitioner on January 28. (Id. at 652.) He saw no injuries to Petitioner's face or neck. (Id.) He did see, however, cuts and scrapes on his hand. (Id. at 653.)

After the State rested, the other of Petitioner's trial counsel, Bradford Kessler, questioned Petitioner on the record and without the jury present about whether Petitioner agreed that a defense of diminished mental capacity should not be presented. (Id. at 719- 729.) Dr. Rabun had examined Petitioner at the State's request and had found no diminished capacity. (Id. at 721.) Dr. Sam Parwatikar had examined Petitioner at the defense's request and had concluded that he was suffering from delirium that night. (Id. at 721-22.) Regardless, Kessler did not believe a defense of diminished mental capacity was a viable defense given that Petitioner had consistently maintained that he was acting in self-defense that night. (Id. at 723-24.) Kessler had informed Petitioner that he thought a diminished mental capacity defense weakened Petitioner's self-defense case and that the diminished mental capacity had a mixed etiology due to Petitioner's intoxication that night. (Id. at 827, 829.)

Petitioner testified that he agreed that the request for an instruction on diminished capacity should be withdrawn. (Id. at 829.) Additionally, Petitioner intended to testify in his own behalf. (Id. at 835.)

Petitioner presented three witnesses. The first two were disinterested witnesses who had been driving by the intersection where the two cars were stopped. (Id. at 706, 738.) They each saw a man lying on the ground. (Id. at 706, 740.) Neither saw anybody doing anything violent to the man on the ground, although the second witness saw one of two men standing above the supine man doing something with his hands. (Id. at 714-15, 740, 753-55.)

Thomas Gould also testified on Petitioner's behalf. He was then on parole and living in a halfway house. (Id. at 759.) The night of January 26, 1996, he drove Petitioner's car to Missouri. (Id. at 763.) When Petitioner first came to his house Gould could tell he had been drinking. (Id. at 801.) Simshauser was with him. (Id. at 763.) Once in Missouri, they saw a black Mustang with two girls and honked their horn. (Id.) At that point, a man in the Mustang looked around one girl. (Id.) The two cars took turns speeding up until Petitioner told him they were going the wrong way. (Id. at 764.) He made a U-turn, the Mustang followed. (Id. at 764-65.) The two cars pulled over and stopped. (Id. at 765- 66.) Gould looked in the rear view mirror and saw a door on the Mustang opening. (Id. at 766.) Somebody approached his car in a crouching position.[3] (Id.) He thought the person might have a gun, so he stepped on the gas and ran a red light. (Id. at 769.) He did not realize that Petitioner had gotten out of the car. (Id.) When he did realize it, he made a U-turn. (Id. at 770.) He saw Petitioner laying on the ground and tried to get

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[3] Gould testified on cross-examination that he had not mentioned the crouching in a prior statement but he did remember it. (Resp. Ex. A-V at 805-06.)

as close as possible to him. (Id. at 771.) He also saw one man standing over Petitioner and another standing farther back. (Id.) He did not seek anybody doing anything. (Id.) As he tried to get close to Petitioner, he accidentally hit McLafferty. (Id. at 773-74.) He thought McLafferty kicked his (Gould's) door. (Id. at 774.) McLafferty told Gould that if he tried to run him over again, he (McLafferty) would kill or hurt him "or something." (Id. at 775.) This was at the side of Gould's car. (Id.) McLafferty then walked over to the side where Viviano was helping Petitioner in the car. (Id. at 776.) McLafferty helped "in an aggravated manner." (Id.) Gould thought McLafferty was "kind of choking" Petitioner. (Id. at 777.) Petitioner had his back to Gould, but Gould could see part of McLafferty's fingers on Petitioner. (Id.) Gould thought Petitioner was in danger and jumped out of the car to help him. (Id. at 778.) He told the two men he would help Petitioner get in the car. (Id. at 779.) He was met in the back of the car by McLafferty. (Id. at 780.) McLafferty took a swing at him; he took a swing at McLafferty. (Id.) McLafferty walked away. (Id.) Viviano walked toward him. (Id. at 782.) Viviano hit Gould and the two men fought. (Id. at 783, 785.) Viviano then said "let's go before the cops get here." (Id. at 785.) Gould walked back to his car; Viviano walked back toward Petitioner. (Id. at 786.) The Mustang left first and in a hurry. (Resp. Ex. A-V at 843.)

On cross-examination, Gould testified that when he saw two guys by Petitioner he did not see anyone jump on, punch, kick, or doing anything else violent to him. (Id. at 811-12.) He saw Viviano help Petitioner off the ground and to the car's back door. (Id. at 814.) Petitioner did not want to get back into the car. (Id. at 815.) Gould never saw McLafferty or Viviano with a gun or a knife. (Id. at 819.)

During the prosecutor's rebuttal closing argument, Kessler moved to strike the prosecutor's remark, "You [the jury] haven't heard any testimony about what he said, about

his theory of the case." (Id. at 940.) Kessler argued that this remark was an impermissible comment on Petitioner's failure to testify. (Id.) The prosecutor explained that his remark referred to Kessler, not Petitioner. (Id. at 940-41.) Although agreeing that the prosecutor had been referring to Kessler, the court granted Petitioner's request to have the remark stricken and the jury instructed to disregard it and denied his request for a mistrial. (Id. at 942.)

Although the jury was instructed on self-defense, they found Petitioner guilty of second degree murder, first degree assault, and two counts of armed criminal action. (Resp. Ex. B at 85-88.) He was sentenced as a prior and persistent offender to four consecutive terms of life imprisonment with the possibility of parole. (Id. at 94-95.)

Petitioner appealed on two grounds: the trial court erred in (1) denying his motion for judgment of acquittal at the close of the State's case and at the close of all the evidence because the State failed to prove beyond a reasonable doubt that the killing and assault were not done in self-defense, and (2) denying his request for a mistrial after the prosecutor referred in closing argument to his failure to testify. (Resp. Ex. C at 14-15.)

The appellate court rejected each, finding, in relevant part:

> Around 11:00 p.m. on January 26, 1996 defendant met two friends in Illinois. They got into defendant's car; however, one of the friends drove. Defendant showed the others a three inch long knife. He told them, "If anybody fucks with me I'll kill them." After midnight, defendant's car came up on decedent [McLafferty], victim [Viviano], and their girlfriends in victim's car on Highway 141 in Jefferson County and temporarily forced them off the road. Defendant's car continued to harass victim's car in

various ways and finally stopped in front of it, causing victim to stop.

Decedent and victim emerged from victim's car and approached defendant's car. Defendant got out of his car and moved quickly toward decedent. Decedent punched defendant in the face and knocked him to the ground. The driver of defendant's car then drove away, made a U-turn, and returned for defendant. The car hit decedent who rolled over the hood, but was not injured. Victim helped defendant to his feet and to the passenger side of defendant's car. Victim told defendant to get in the car and go because they did not want to fight. Victim and decedent turned away from defendant's car and started walking back to their own car.

At that point, defendant pulled a knife from his back pocket, left the car, came up behind decedent, and stabbed him. Simultaneously, the driver of defendant's car punched victim and victim eventually grabbed his arms to keep him from fighting. Victim, who had his back to defendant and decedent, felt a blow to his side. He told driver again he did not want to fight and let the driver go. The driver ran back to the car. Victim turned and looked at decedent who was drenched in blood and said he had been stabbed. Victim was also bleeding profusely and realized he had been stabbed as well.

Victim and decedent returned to their car and their girlfriends drove them to St. Anthony's Hospital. Decedent was stabbed seven times in the back, once on the side, once on the arm, and once in the abdomen. Decedent died later that day from a stab wound to the left side of his chest that had pierced his heart. Victim was stabbed three times in the side and three times in the arm, requiring a five-day hospitalization. The stab wounds were made by a sharp bladed instrument with a blade at least three inches in length.

. . .

. . . [D]eadly force may be used in self-defense only when there is: (1) an absence of aggression or provocation on the part of the defendant; (2) a real or apparently real necessity for the defender to kill in order to save himself from an immediate danger of serious bodily injury or death; (3) a reasonable cause for the defender's belief in such necessity; and (4) an attempt by the defender to do all within his power consistent with his personal safety to avoid the danger and need to take a life.

. . .

Defendant points to the existence of testimony which would support his argument that he acted in self-defense and that he was in fear of his life. However, this evidence was not undisputed. The state adduced sufficient evidence to support an inference that defendant did not have a reasonable belief that deadly force was necessary to protect himself. The fight had ended and this fact was communicated to defendant by victim who told defendant to get into the car because they did not want to fight. Defendant and victim, who were unarmed, then walked away. Defendant was in the safety of his car when he pulled a knife from his back pocket, ran after decedent and victim, and stabbed them. Regardless of whether defendant was or was not at fault in the earlier struggle, he became the aggressor when he renewed the fight. Further, self-defense is justified only when danger is imminent, not when the victim is in retreat.

. . . Defendant was not entitled to acquittal as a matter of law. . . .

In his second point defendant contends that the trial court erred in overruling defendant's request for a mistrial "when the prosecutor in closing argument

pointed to defendant[4] and remarked that the jury had heard from the medical examiner his theory of how the killing took place but had not heard his theory of the case, referring to defendant," which was a comment on the defendant's failure to testify.

. . .

Defendant challenges the following remark which the prosecutor made during the rebuttal portion of the state's closing argument. "You haven't heard any testimony about what he said, about his theory of the case."

Defense counsel objected to the statement. During a sidebar conference the state explained the comment was directed to the defense counsel's failure to show any evidence to prove the theory he had just set forth in his closing argument. In fact, the state had begun its rebuttal argument by describing "Mr. Kessler's theory" of the case and continued discussing the problems with that theory during its rebuttal argument. The sentence complained of fell within this discussion. Nevertheless, the judge sustained the objection, cautioned the jury to disregard the statement, ordered the statement stricken from the record, but denied the motion for mistrial. The state then continued with its rebuttal argument by starting out with the words "Mr. Kessler's theory. . . ."

We are not persuaded that the remark was a direct or indirect reference to defendant's failure to testify. . . .

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[4] The appellate court inserted at this point the following footnote.

"Nothing in the record indicates that the prosecutor pointed at anyone. Defense counsel did not raise this in his objection." (Resp. Ex. E at 6.)

> The remark was made during rebuttal by the state after the defense counsel had argued a theory to the jury. The entire preceding portion of the rebuttal was specifically devoted to an analysis of defense counsel's theory and defense counsel was identified by name. In this context, the "he" and "his" as used in the "he said" and "his theory" logically refers to defense counsel, not defendant. If there was any possibility that the jury misunderstood to whom the "he" and "his" referred, the trial court's action sufficiently cured any misunderstanding.

The trial court did not abuse its discretion in denying a mistrial. . . . (Resp. Ex. E at 2-7.) (All but second-to-last alteration added.) (Second footnote omitted.)

Petitioner moved for post-conviction relief pursuant to Missouri Supreme Court Rule 29.15. (Resp. Ex. I at 7-22.) His motion was amended by appointed counsel and was submitted following an evidentiary hearing at which Wittner and Petitioner's first trial counsel, Joseph Sanchez, testified and the introduction of Petitioner's and Kessler's depositions. (Id. at 27-48, 50-64.)

Wittner testified that he did not recall Petitioner calling his attention to something one of the jurors had done and did recall that Dr. Parwatikar's report was "rather confusing and problematic." (Resp. Ex. F at 14, 17.) Sanchez testified that he had obtained a report of a forensic expert, August C. Milgess,[5] that a shoe print on the front driver's door of Petitioner's car matched McLafferty's shoes, that he had planned on introducing the report to establish that McLafferty was the initial aggressor, and that he had given Kessler the report. (Id. at 25, 30, 31-32.) Kessler testified in

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[5] This name is spelled elsewhere in the record as "Nilges."

his deposition that it was never brought to his attention that a juror had mouthed something to Petitioner; he would have remembered if it had been. (Resp. Ex. G at 17-18.) He did not introduce the forensic report because (a) it was a "little bit disingenuous to argue that [McLafferty] kicked the car and he deserved to be stabbed"; (b) "[y]ou can't kill somebody for hurting your property[;]" and (c) it was undisputed that McLafferty was the initial aggressor. (Resp. Ex. G at 35-37.) He did not recall that a defense of others was supported by the evidence. (Id. at 43.) Moreover, "if the person against whom the greater harm was directed [didn't] have a right to defend himself, then you certainly aren't going to make a case that he had a right to defend someone else with deadly force[.]" (Id. at 46.) Additionally, Kessler testified that a defense of diminished mental capacity would have weakened Petitioner's defense of self-defense. (Id. at 49.)

Petitioner also thought that the shoe print on the door would have established that McLafferty was the initial aggressor and he told Kessler that he wanted that evidence introduced. (Resp. Ex. H at 9, 11.) Evidence that he was suffering from delirium that night would have explained why he did not know that he was hitting McLafferty in the areas he did and why he thought he was hitting him in the arm and shoulder. (Id. at 40.) When he did stab McLafferty he did not know where Gould was; however, when he went to get away from McLafferty he ran into Viviano and it looked like Viviano had Gould by his head. (Id. at 25, 81.) He was concerned for both himself and Gould. (Id. at 26.) McLafferty tried to strangle Gould also. (Id. at 85.) Petitioner further testified that, although he had told the trial court that it was his decision to withdraw the defense of diminished mental capacity, it was not. (Id. at 89.) He did not think his

record – 18 felonies[6] – would have had any affect on the jury because they were all for burglary. (Id. at 44-45.) And, he always carried a knife for self-defense but had not needed it until that night. (Id. at 72.) Petitioner had had at least twelve 12 or 16 ounce beers that night. (Id. at 69.)

The motion court denied relief. (Resp. Ex. I at 50-54.) Addressing Petitioner's claim that his trial counsel was ineffective for not submitting an instruction on defense of another, the court found that such decision was a matter of trial strategy and that Petitioner had failed to establish prejudice from that decision. (Id. at 51.) Counsel was not ineffective for not presenting the shoe print evidence because it had already been established that McLafferty was the initial aggressor and counsel's perception that the kicking of the car would not, in the minds of the jurors, justify the stabbing was a matter of trial strategy. (Id. at 51-52.) Counsel's decision not to present a defense of diminished mental capacity was also a matter of trial strategy based on counsel's decision that the defense would detract from the defense of self-defense. (Id. at 52.) Moreover, (a) there was nothing to indicate that the jury would have believed the testimony of Dr. Parwatikar over Dr. Rabun and (b) Petitioner knowingly waived his right to proceed on that defense. (Id.) Addressing Petitioner's claim that trial counsel was ineffective for failing to bring to the court's attention the words mouthed by one of the jurors, the court found that Petitioner had failed to prove that such misconduct had occurred. (Id. at 53.)

Petitioner appealed. (Resp. Ex. J.) Each of his four grounds was found to be without merit in a one-paragraph unpublished per curiam order. (Resp. Ex. L.)

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[6] Petitioner was 30 years old at the time of trial.

Petitioner now seeks federal habeas relief on his previously-presented claim of prosecutor misconduct and four claims of ineffective assistance of trial counsel and on a new claim of ineffective assistance of trial counsel for failure to introduce a report by a Dr. Payne about the wounds on McLafferty that would have supported Petitioner's description of events. Petitioner explains that this sixth ground was not presented to the state courts because the post-conviction process failed; specifically, post-conviction counsel effectively abandoned him by not including this ground although he had informed her of it.

Discussion

Standard of Review. Title 28 U.S.C. § 2254(d) mandates that a federal court "not grant habeas relief on a claim that was adjudicated on the merits in state court unless 'it resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States,'" *James v. Bowersox*, 187 F.3d 866, 869 (8th Cir. 1999) (quoting § 2254(d)(1)), or it "'resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding,'" *Evans v. Rogerson*, 223 F.3d 869, 871 (8th Cir. 2000) (quoting § 2254(d)(2)). See also *Weaver v. Bowersox*, 241 F.3d 1024, 1029 (8th Cir. 2001) ("Section 2254(d) distinguishes between two types of erroneous decisions – those of law and those of fact[.]").

The "contrary to" clause and the "unreasonable application" clause have independent meanings. *Williams v. Taylor*, 529 U.S. 362, 405 (2000). "[A] state court decision is 'contrary to [the Supreme Court's] clearly established precedent if the state court applies a rule that contradicts the governing law set forth in [Supreme Court] cases' or 'if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme Court] and

nevertheless arrives at a result different from [their] precedent.'" *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003) (quoting *Williams*, 529 U.S. at 405-06) (alterations added). "On the other hand, a run-of-the-mill state-court decision applying the correct legal rule from [Supreme Court] cases to the facts of a prisoner's case would not fit comfortably within §2254(d)(1)'s 'contrary to' clause." *Williams*, 529 U.S. at 406 (alteration added). Thus, a state court decision that correctly identifies the controlling legal authority and, applying that authority, rejects a prisoner's claim does not fit within the "contrary to" clause although it might be contrary to a federal court's conception of how that authority ought to be applied in that particular case. *Id.*

Such a state court decision can, however, fit within the "unreasonable application" clause. Id. at 407-08. "[W]hen a state-court decision unreasonably applies the law of [the Supreme Court] to the facts of a prisoner's case, a federal court applying § 2254(d)(1) may conclude that the state-court decision falls within that provision's 'unreasonable application' clause." *Id.* at 409 (alterations added). "[A] federal habeas court making the 'unreasonable application' inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable." *Id.* (alteration added). When making this inquiry, a federal habeas court should note that "an unreasonable application of federal law is different from an incorrect application of federal law." Id. at 410. "It is not enough that a federal habeas court, in its independent review of the legal question, is left with a firm conviction that the state court was erroneous." *Lockyer*, 538 U.S. at 75 (internal quotations omitted). And, "'[t]o the extent that inferior federal courts have decided factually similar cases, reference to those decisions is appropriate in assessing the reasonableness . . . of the state court's treatment of the contested issue.'" *Copeland v. Washington*, 232 F.3d 969, 974 (8th Cir. 2000) (quoting *Long v. Humphrey*,184 F.3d

758, 761 (8th Cir. 1999)) (alterations in original). Additionally, "the [state courts'] 'summary nature' of the discussion of [a] federal constitutional question does not preclude application of the AEDPA standard." *Brown v. Luebbers*, 371 F.3d 458, 462 (8th Cir. 2004) (alterations added).

Claim One: Prosecutorial Misconduct. Petitioner first contends that the prosecutor improperly commented in the rebuttal portion of his closing argument on Petitioner's failure to testify by telling the jury that they had not "heard any testimony about what he said, about his theory of the case." Respondent counters, and the state appellate court so found, that the "he" and "his" refer to Kessler. Petitioner argues in his traverse that the prosecutor was referring to Petitioner and the state appellate court's finding otherwise is an unreasonable determination of the facts.

In response to the prosecutor's argument that Petitioner did not have to get out of the car once Viviano and McLafferty put him there and did not have to stab either as many times as he did, Kessler argued that the law required that Petitioner reasonably believed that he used the amount of force necessary to defend himself, not that his belief was right.

(Resp. Ex. A-V at 924-25.) "[I]t doesn't matter what's true, it's what is perceived. It is what is the perception of the person who uses force to defend himself[.]" (Id. at 930-31.) Kessler further argued that the evidence of Dr. Nanduri was inconsistent with someone being stabbed when their back was to their assailant. (Id. at 935.) "The only explanation is that person had to have been facing him, had to have been preventing the other person from moving enough because every single one [wound] is in the same track." (Id.) The third sentence in the prosecutor's rebuttal began with "Mr. Kessler's theory . . ." (Id. at 938.) The fourth sentence refers to "the theory" when Kessler was questioning the doctor. (Id.

at 939.) A short time later, the prosecutor made the two objected-to references. (Id. at 940.)

"[T]he Fifth Amendment 'forbids . . . comment by the prosecution on the accused's silence . . .'" *United States v. Robinson*, 485 U.S. 25, 30 (1988) (quoting *Griffin v. California*, 380 U.S. 609, 615 (1965)) (alterations added). Accord *United States v. Triplett*, 195 F.3d 990, 995 (8th Cir. 1999); *United States v. McDougal*, 137 F.3d 547, 559 (8th Cir. 1998). The impermissible comment may be either direct or indirect. *Triplett*, 195 F.3d at 995 (citing *Sidebottom v. Delo*, 46 F.3d 744, 759 (8th Cir. 1995)). "'Indirect references to a defendant's failure to testify are . . . prohibited if they either (1) manifest the prosecutor's intention to call attention to the defendant's failure to testify, or (2) are such that the jury would naturally have understood them as a comment on the defendant's failure to testify.'" Id. (quoting *Sidebottom*, 46 F.3d at 759) (alteration in original). "On a habeas petition, [the Court] review[s] any improper reference to determine if it had a 'substantial and injurious effect or influence in determining the jury's verdict.'" *Parkus v. Delo*, 33 F.3d 933, 941 (8th Cir. 1994) (quoting *Brecht v. Abrahamson*, 503 U.S. 619, 637 (1993)) (alterations added).

The trial court interpreted the two remarks at issue to be a reference to the theory of the case presented by Kessler in his closing argument. The reasonableness of the trial court's interpretation must be examined in the context in which the comments were made and also requires an analysis of the trial evidence. *United States v. Gardner*, 396 F.3d 987, 991 (8th Cir. 2005). "'[A] court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations.'" *Id.* at 992 (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 647 (1974)) (alteration added).

The context is that the prosecutor made the two remarks following defense counsel's closing argument. In his argument, Kessler did present a theory of the case, specifically that Petitioner reasonably believed that he was under attack by two men significantly larger than he and that the wounds described by Dr. Nanduri were more consistent with Petitioner being attacked from the front than with Petitioner running up behind someone. The prosecutor began his rebuttal with a reference to "Mr. Kessler's theory." An interpretation that later references to "his theory" and what "he said" are also to Kessler is not unreasonable. See *United States v. Carl*, 978 F.2d 450, 452 (8th Cir. 1992) (holding that court could not find prosecutor clearly intended to comment on defendant's failure to testify "if some other explanation for the remarks is equally plausible"). See also *Herrin v. United States*, 349 F.3d 544, 546 (8th Cir. 2003) (finding no improper remark when context of comment that "[a] guilty man doesn't say anything" established that it referred to other accused, i.e., prosecutor referred to that accused in opening of his statement); *Parkus*, 33 F.3d at 941 (finding no improper remark on petitioner's failure to testify by prosecutor who commented that the jury could only determine "what a man [wa]s thinking by his actions, or if he tells you"; comment was made in response to defense attorney's arguments about lack of motive and deliberation and was single short comment during trial lasting several days).

Moreover, the remarks were not made in reference to something about which only Petitioner could have testified. See *Gardner*, 396 F.3d at 992; *Triplett*, 195 F.3d at 995. See also *United States v. Dunlap*, 28 F.3d 823, 825-26 (8th Cir. 1994) (holding that prosecutor did not refer to defendant's failure to testify when arguing that there was no evidence to support defendant's theory; there was no such evidence and such evidence could have been presented by other witnesses). The remarks were also made at the end of a three-day trial,

and the jury, having been earlier instructed that it could not consider anything the court told it to disregard or which the court ordered stricken from the record, was told to disregard the remarks and they were stricken from the record. (Resp. Ex. B at 66.) "'The rule that juries are presumed to follow their instructions is a pragmatic one, rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation of the interests of the state and the defendant in the criminal justice process.'" *Gardner*, 396 F.3d at 993 (quoting *Richardson v. Marsh,* 481 U.S. 200, 211 (1987)).

For the foregoing reasons, the undersigned finds that the prosecutor's two challenged remarks were not a direct or indirect reference to Petitioner's failure to testify. Had they been, however, Petitioner was not prejudiced by the two brief remarks, stricken from the record, in the context of the entire trial.

Claims Two through Five: Ineffective Assistance of Trial Counsel. Petitioner's next four claims allege ineffective assistance of trial counsel and were raised in his postconviction appeal.

"The right to effective assistance of counsel 'is a fundamental right of criminal defendants; it assures the fairness, and thus the legitimacy, of our adversary process.'" *Smith v. Rogerson*, 171 F.3d 569, 572 (8th Cir. 1999) (quoting *Kimmelman v. Morrison*, 477 U.S. 365, 374 (1986)). "'The benchmark for judging any claim of ineffectiveness [of counsel] must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the [relevant proceeding] cannot be relied on as having produced a just result.'" *Jackson v. Gammon*, 195 F.3d 349, 354 (8th Cir. 1999) (quoting *Kellogg v. Skon*, 176 F.3d 447, 452 (8th Cir. 1999)) (first alteration added; second in original). "Only reasonable competence, the sort expected of the ordinary fallible lawyer,

is demanded by the Sixth Amendment." *White v. Helling*, 194 F.3d 937, 941 (8th Cir. 1999) (internal quotations omitted). Moreover, "[t]here is a strong presumption that counsel's challenged actions or omissions were, under the circumstances, sound trial strategy." *Garrett v. Dormire*, 237 F.3d 946, 949-50 (8th Cir. 2001) (alteration added).

To establish that counsel's lack of competence violated the Sixth Amendment, the petitioner must show that counsel's performance was deficient and prejudicial. *Kellogg*, 176 F.3d at 452. To establish that counsel's performance was deficient, a petitioner must show that counsel "'made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.'" *Greiman v. Thalacker*, 181 F.3d 970, 971 (8th Cir. 1999) (quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). To establish prejudice, a petitioner must demonstrate "'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id.* (quoting *Strickland*, 466 U.S. at 697). "'A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Carroll v. Schriro*, 243 F.3d 1097, 1100 (8th Cir. 2001) (quoting *Strickland*, 466 U.S. at 694). "'In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury.'" *Lawrence v. Armontrout*, 31 F.3d 662, 666 (8th Cir. 1994) (quoting *Strickland*, 466 U.S. at 695). The burden of showing a reasonable probability is the petitioner's. *Lawrence v. Armontrout*, 961 F.2d 113, 115 (8th Cir. 1992).

The question of prejudice from counsel's performance need not be reached if the performance was not deficient. See *Parkus v. Bowersox*, 157 F.3d 1136, 1140 (8th Cir. 1998). Conversely, the question of counsel's allegedly deficient performance need not be reached if a petitioner has failed to show prejudice. See *Strickland*, 466 U.S. at 697; *Hoon v.*

Iowa, 313 F.3d 1058, 1061 (8th Cir. 2002); *Siers v. Weber*, 259 F.3d 969, 974 (8th Cir. 2001). Thus, if a petitioner has failed to show that, but for an allegedly deficient performance by his trial counsel, there is a reasonable probability that the outcome of his trial would have been different, his claim of ineffective assistance of counsel fails.

Petitioner's claim that his trial counsel was ineffective for failing to request an instruction on defense of a third-person was rejected by the state courts on the grounds that the decision not to submit the omitted instruction was a matter of trial strategy.

"'[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable.'" *Neal v. Acevedo*, 114 F.3d 803, 807 (8th Cir. 1997) (quoting *Strickland*, 466 U.S. at 690) (alteration in original). This is true "even if that strategic decision proves unwise." *Wing v. Sargent*, 940 F.3d 1189, 1191 (8th Cir. 1991). Moreover, "[t]he fact that hindsight later reveals defects in counsel's strategy does not render that strategy unreasonable." *Id.* (alteration added). The strength of the presumption that a strategic choice is reasonable varies, however, with the adequacy of the investigation. *White v. Roper*, 416 F.3d 728, 732 (8th Cir. 2005). The more thorough or complete the investigation, the stronger the presumption. *Id.*

Citing *State v. Jones*, 627 S.W.2d 322 (Mo. Ct. App. 1982) and *State v. Vancil*, 976 S.W.2d 628 (Mo. Ct. App. 1998), Petitioner argues that his trial counsel did not make such an investigation because a defense of defense of others is not inconsistent with a defense of self-defense. Petitioner misapprehends trial counsel's strategy.

Trial counsel testified that he thought the evidence did not support the omitted instruction, not that such an instruction was always inconsistent with an instruction on

self-defense. The issue in *Jones* and *Vancil* was whether the trial court had erred in refusing to give the defendant's requested instruction on justification by lawful defense of another person. "Defense of another person is available if, under the circumstances as the actor reasonably believes them to be, the person whom he seeks to protect would be justified in using such protective force in defense of himself." *Vancil*, 976 S.W.2d at 630. The appellate court held in *Jones* that, although the jury had been instructed on self-defense, the trial court had erred in not giving the defense-of-another instruction because there was evidence supporting such an instruction, specifically, evidence that the victim had knocked the defendant's sister to the floor and was standing over her when the defendant, responding to a call for help, entered the room, fired a warning shot, and then shot at the victim as the victim turned and rushed toward him. 627 S.W.2d at 323. In *Vancil*, two groups were fighting and the defendant, in one group, attacked the victim, in the second group, as the victim pursued another man, Dixon, into a store. 976 S.W.2d at 629. The trial court instructed on lawful defense of another person as to another man, Rose, that had been with defendant, but refused to instruct on defense of Dixon. *Id.* The state conceded that this was error, and the appellate court so found. *Id.* at 630.

The question in the instant case, however, is not of trial court error but of trial counsel strategy. The only evidence that would have supported an instruction on defense of another was the testimony of Gould. Gould – described by defense counsel in closing as "[a] guy who starts trouble and then tries to run from it" – testified that McLafferty took a swing at him; he took a swing at McLafferty; and McLafferty walked away. (Resp. Ex. A-V at 933.) Viviano hit him; he hit back; the two fought; they stopped fighting; and Gould walked backed to his car. Thus, the events described by Gould establish that the physical altercation between him and Viviano and him and McLafferty stopped before any use of

deadly force. Petitioner testified in his deposition that he was afraid for Gould; however, this testimony was not before the jury.

Petitioner has failed to show that trial counsel's decision was not a strategic one made after a thorough investigation. Although he disagrees with this decision, his conclusory disagreement alone does not suffice to make this necessary showing.

Additionally, Petitioner cannot show any prejudice from the decision. The Missouri Court of Appeals held in *Hill v. State*, 160 S.W.3d 855 (Mo. Ct. App. 2005), that the failure to instruct on defense of another was not prejudicial in a case in which the jury's rejection of a defense of self-defense also answered the question whether the defendant had acted in lawful defense of another. *Id.* at 862. The only factual possibility that would have supported either established that any use of deadly force would have been simultaneously in self-defense and in defense of another. *Id.* Similarly, in the instant case, the factual possibility that would permit the jury to find that Petitioner acted in selfdefense depended on the jury finding that he reasonably believed that he was in "imminent danger of harm." (Resp. Ex. B at 72, 77.) For the jury to reject this defense they would have had to believe the testimony that Petitioner attacked McLafferty and Viviano after being put in the car and being able to withdraw from the situation. Their rejection of this defense would apply equally to any defense of Gould.

Petitioner next argues that his trial counsel was ineffective for failing to introduce a forensic expert's report matching the shoe print on the driver's door of his car to shoes worn by McLafferty.[7] Assuming, without deciding or

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[7] Petitioner emphasizes that his former trial counsel, Sanchez, had planned to introduce this testimony. Counsel is

implying that this decision was erroneous, Petitioner cannot show prejudice. It was undisputed that McLafferty was the initial aggressor and was a big man. The only evidence of him kicking the door came from Gould's testimony that it happened when he hit McLafferty with the car. The question before the jury was whether Petitioner stabbed McLafferty and Viviano after being able to withdraw from any confrontation, not whether McLafferty was the initial aggressor.

Petitioner's fourth claim, and his third claim of ineffective assistance of trial counsel, is that counsel should have presented evidence of his diminished mental capacity at the time of the stabbing. He argues that a diminished capacity defense is not inconsistent with a claim of self-defense and that Dr. Parwatikar's report was more thorough than that of Dr. Rabun and would have been found to be more credible.

Again, his constitutional challenge to trial counsel's decision is no more than a disagreement with counsel's strategy. Dr. Parwatikar's report was fourteen pages long and concluded that "[Petitioner] partially recovered from this post concussion delirium after he was pushed into the car and Mr. Gould turned the dome light on [on the way back to Illinois] and seeing the injury to his hand and the knife, some realization of his actions occurred." (Traverse Ex. 1 at 14.) According to this report, Petitioner was "heavily intoxicated" that night and "had had at least twenty beers if not more." (*Id.* at 11.) Dr. Rabun's report was seventeen pages long and concluded that Petitioner was capable of "knowing and appreciating the nature, quality, and wrongfulness of his conduct at the time of the alleged offense." (Traverse Ex. 3 at

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not "ineffective under constitutional standards merely because other lawyers may have used another strategy." *Wing*, 940 F.3d at 1192 (interim quotations omitted).

17.) One of Petitioner's trial counsel described Dr. Parwatikar's report as "problematic." Indeed, Dr. Parwatikar's reference to Petitioner being heavily intoxicated and having partially recovered from the delirium after being pushed into the car is not an unqualified finding of diminished mental capacity. His other counsel recommended against submitting a defense of diminished mental capacity based on this report on the grounds that it would weaken Petitioner's self-defense argument. Under oath, Petitioner informed the court that he agreed with this decision. The lack of success of this strategy does not render it unreasonable.

Petitioner's last claim of ineffective assistance of trial counsel is based on his allegations that a juror mouthed "I'm going to get you" during trial and that, although he informed both attorneys of this, neither brought it to the court's attention. One trial counsel could not recall Petitioner telling him about the juror; the other specifically testified that he was not told. The state court found Petitioner did not inform his counsel of the juror misconduct. "[S]tate court factual findings carry a presumption of correctness that will be rebutted only by clear and convincing evidence." *Cox v. Burger*, 398 F.3d 1025, 1028 (8th Cir. 2005) (interim quotations omitted) (alteration added). Additionally, "[f]ederal habeas review 'gives federal courts no license to redetermine [the] credibility of witnesses whose demeanor has been observed by the state trial court, but not by them.'" *Perry v. Kemna*, 356 F.3d 880, 885 (8th Cir. 2004) (quoting *Marshall v. Lonberger*, 459 U.S. 422, 434 (1983)) (first alteration added; second in original). Thus, the motion court's factual finding that Petitioner did not tell counsel of the remark defeats his fifth claim.

Sixth Claim: Ineffective Assistance of Counsel. Petitioner's sixth claim – that counsel was ineffective for failing to obtain and present evidence that Petitioner's description of events corresponded with physical evidence of

the wounds on McLafferty[8]– was not raised in the appeal from the denial of his post-conviction motion.

Title 28 U.S.C. § 2254(b)(1)(A) and the Supreme Court bar the granting of habeas corpus relief unless it appears that the state prisoner has exhausted available state court remedies. See *Baldwin v. Reese*, 541 U.S. 27, 27 (2004); *Gray v. Netherland*, 518 U.S. 152, 161 (1996); *Coleman v. Thompson*, 501 U.S. 722, 730 (1991). "'Because "it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation," federal courts apply the doctrine of comity, which "teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter." *Dan v. Burford*, 339 U.S. 200, 204 (1950))." *Id.* at 731 (quoting *Rose v. Lundy*, 455 U.S. 509, 518 (1982)). See also *Weeks v. Bowersox,* 119 F.3d 1342, 1349-50 (8th Cir. 1997) ("Requiring the exhaustion of state remedies both allows the states to correct any possible constitutional violations without unnecessary intrusion by the federal courts and allows the state courts to create a factual record should the matter proceed to federal court.").

It is undisputed that Petitioner did not present this second claim in the appeal from the denial of his Rule 29.15 motion, see Mo.S.Ct.R. 29.15(a) (requiring claims of ineffective assistance of trial and appellate counsel to be raised in Rule 29.15 motion), and that there is no other available state remedy for him to now present them, see Mo.S.Ct.R. 29.15(l)

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[8] The evidence at issue an October 1999 opinion by Richard L. Payne, M.D., that the fatal wound to McLafferty could not have been made from behind. (Traverse Ex. 4 at 1.)

(forbidding circuit courts from entertaining successive Rule 29.15 motions).

"[A] habeas petitioner who has failed to meet the State's procedural requirements for presenting his federal claims has deprived the state courts of an opportunity to address those claims in the first instance. A habeas petitioner who has defaulted his federal claims in state court meets the technical requirements for exhaustion; there are no state remedies any longer 'available' to him." *Coleman*, 501 U.S. at 732 (alteration added). Thus, Petitioner has met the technical requirement for exhaustion of this claim.

In order to preclude habeas petitioners from avoiding the exhaustion requirement and to "ensure[] that the States' interest in correcting their own mistakes is respected in all federal habeas cases," *id.* (alteration added), the state procedural bar that gives rise to a habeas petitioner having technically satisfied the exhaustion requirement provides an independent and adequate state-law ground for the petitioner's conviction, *id.* at 730; *Gray*, 518 U.S. at 162. This independent and adequate state law ground prevents federal habeas review of a defaulted claim "unless [the petitioner] can show cause and prejudice for the default, or actual innocence." *Clemons v. Luebbers*, 381 F.3d 744, 750 (8th Cir. 2004) (alteration added). The failure to include specific claims in the appeal from the denial of a Rule 29.15 motion results in those claims being procedurally barred. See *Osborne v. Purkett*, 411 F.3d 911, 919 (8th Cir. 2005).

"'[T]he existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule.'" *Ervin v. Delo*, 194 F.3d 908, 915 (8th Cir. 1999) (quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986)) (alteration in original). There is no exhaustive catalog of the objective impediments, nor have the precise contours of the cause requirement been

clearly defined. *Ivy v. Caspari*, 173 F.3d 1136, 1140 (8th Cir. 1999). "At a minimum, however, [Petitioner] must show that 'something external to [him], something that cannot fairly be attributed to him,' caused the procedural default." *Id.* (quoting *Coleman*, 501 U.S. at 753) (first alteration added; second in original).

Petitioner argues that the failure of post-conviction counsel to raise this claim is cause for the resulting procedural default. The alleged ineffectiveness of state postconviction counsel cannot, however, supply the required cause to excuse a procedural default. *Taylor v. Bowersox*, 329 F.3d 963, 971 n.13 (8th Cir. 2003); *Burns v. Gammon*, 173 F.3d 1089, 1092 (8th Cir. 1999); *Malone v. Vasquez*, 138 F.3d 711, 719 (8th Cir. 1998). Petitioner attempts to evade this holding by contending that the default was caused by post-conviction counsel's failure to raise it; thus, counsel effectively abandoned Petitioner. This contention is unavailing.

The merits of a procedurally defaulted claim may be reached if actual innocence is established. See *Cox*, 398 F.3d at 1031. To do so, a petitioner "must come forward with new reliable evidence that was not available at trial[.]" *Nance v. Norris*, 392 F.3d 284, 291 (8th Cir. 2004) (alteration added). The report at issue, see note 7, above, was not new, could have been available at trial, and was available before the evidentiary hearing on Petitioner's post-conviction motion. This sixth claim is procedurally barred.

Conclusion

For the foregoing reasons, Petitioner's first five claims are without merit and his last is procedurally barred. Accordingly,

IT IS HEREBY ORDERED that the Attorney General of Missouri, Jeremiah W. Nixon, is added as a Respondent.

IT IS HEREBY RECOMMENDED that the 28 U.S.C. §2254 petition of Donald Roberts be DENIED without further proceedings.

The parties are advised that they have eleven (11) days in which to file written objections to this Report and Recommendation pursuant to 28 U.S.C. §636(b)(1), unless an extension of time for good cause is obtained, and that failure to file timely objections may result in waiver of the right to appeal questions of fact. See *Griffini v. Mitchell*, 31 F.3d 690, 692 (8th Cir. 1994).

Dated this 16th day of March, 2006

/s/

THOMAS C. MUMMERT III

UNITED STATES MAGISTRATE JUDGE

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October 21, 1999

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Dear Ms. Stroup:

I reviewed some of the records you gave me.

Donald Roberts was not driving a car. Christopher McLafferty and Donald Roberts both exited from their respective vehicles. Christopher McLafferty struck Donald Roberts with his Right hand resulting in injury to Christopher McLafferty's Right hand, and, resulting in a concussion to Donald Roberts. Donald Roberts, following the concussion,

fell to the ground in a supine position and became unconscious.

Christopher McLafferty died from a stab wound that entered the Left axilla and lacerated the Right posterior ventricle resulting in hemopericardium and cardiac tamponade. The stab wound that killed Christopher McLafferty was done by a frontal approach and Christopher McLafferty's Left arm had to be extended to expose the axilla at the time of the injury to Christopher McLafferty. Donald Roberts was not behind, or posterior to, Christopher McLafferty at the time of the stab wound to the axilla and Right heart of Christopher McLafferty.

Christopher McLafferty struck Donald Roberts resulting in a concussion to Donald Roberts and a temporary unconscious state. As Donald Roberts was returning to a conscious state, he may have been in a state of hyperactivity or fright, particularly if there was neck or tracheal compression resulting in either hypoxia (decreased 02) or hypercapnia (increased CO2). Therefore, the striking of Donald Roberts by Christopher McLafferty may have significantly contributed to the death of Christopher McLafferty.

Please find attached a copy of a portion of the medical record of Christopher McLafferty from St. Anthony's Medical Center. Please note the patient arrived at the emergency room at approximately 0145 hours on January 27, 1996. On arrival he had no blood pressure; pulse rate was 120; he had no respiratory rate; he had no lung sounds; the EKG showed a sinus tachycardia; his skin color was cyanotic; his skin temperature was cool; and he had no eye, verbal or motor response. The pupils were reactive and measured 3mm. The patient at this time was, in all probability, brain dead. If resuscitation attempts were

successful, i.e. immediate thoracotomy, removal of hemopericardium, and suture of the Right ventricular laceration, the patient in all probability would not have had a return of spontaneous respirations because of ischemic encephalopathy to the respiratory center in the medulla. To argue that there was delay in his medical care would not be reasonable because the end result would have been, at best, a patient that was brain dead.

The stab wound in the Left axilla of Christopher McLafferty was utilized by hospital personnel in the emergency room as the placement site for a chest tube. This was noted in the history and physical written by Dr. Egan, copy attached.

Should you have any questions, please do not hesitate to call or write. Thank you.

/S/

RICHARD L. PAYNE, M.D.

Enclosures

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

DONALD ROBERTS	§	
Appellant,	§	
	§	
v.	§	No. 06-1899
	§	
MIKE KEMNA and,	§	
JEREMIAH NIXON	§	
Appellees.	§	

Order Denying Petition for Rehearing and for Rehearing En Banc

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

August 29, 2006

Order entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit